IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:- 29.09.2006

Coram:-

The Hon'ble Mr. Justice P.SATHASIVAM
and
The Hon'ble Mr. Justice S.TAMILVANAN

Habeas Corpus Petition No.414 of 2006

Aboo Backer Asmath ... Petitioner

vs.

1. The State of Tamilnadu
rep. by the Secretary to
the government,
Public (SC) Dept., Fort St. George,
Chennai 600 009.

2. The Union of India represented by
The Secretary the government,
Ministry of Finance,
Dept. of Revenue, (COFEPOSA-UNIT),
New Delhi.

3. The Superintendent of Central Prison,
Central Prison, Chennai-600 003. ... Respondents

Petition under Article 226 of the Constitution of India for the issuance of a writ of habeas corpus to call for the records relating to the detention order in G.O.No.S.R.1/253-4/2006 dated 03.04.2006 passed by the first respondent, quash the same, direct the respondent to produce the body of the person of the detenu namely Aboo Backer Asmath, son of Abookbacker, before Court, now detained under Sec.3(1)(i) of the COFEPOSA Act in the Central Prison, Chennai, and set him at liberty.

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For Petitioner : Mr.S.Palani Kumar.
For R-1 & R-3 : Mr.M.Babu Muthu Meeran,
Addl. Public Prosecutor.
For R-2 : Mr.P.Kumaresan, Addl. Central
Govt. Standing Counsel.

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O R D E R

P.SATHASIVAM, J.

The petitioner herein challenges the impugned order of detention, dated 03.04.2006, detaining him under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

2. Heard Mr.S.Palani Kumar, learned counsel for the petitioner; Mr.M.Babu Muthu Meeran, learned Additional Public Prosecutor for R-1 and R-3; and Mr.P.Kumaresan, learned Additional Central Government Standing Counsel for R-2.

3. Though several contentions have been raised questioning the detention order, Mr.Palani Kumar, learned counsel for the petitioner, at the foremost, submitted that failure to place the sanction order and the criminal complaint before the Advisory Board and the Confirming Authority is fatal to the detention order. Elaborating the above contention, it is submitted that the sanction order and the criminal complaint, being vital documents; and, inasmuch as the initiation of criminal and adjudication proceedings was taken into consideration by the Detaining Authority while passing the detention order and the same having been referred to in the grounds of detention; both the documents must have been placed before the Advisory Board and the Confirming Authority prior to the passing of the confirmation order. According to the counsel, non-placing of those vital materials before the Advisory Board and the Confirming Authority vitiates the continued detention.

4. It is not in dispute that any document, which is relevant and having a bearing upon the grounds of detention, must be forwarded to the Advisory Board and the Confirming Authority. It is seen from the grounds of detention that the initiation of prosecution proceedings was taken into consideration by the Detaining Authority while arriving at the subjective satisfaction.

5. In paragraph No.3 of the grounds of detention, the Detaining Authority has specifically referred to the adjudication proceedings and the prosecution proceedings, in such circumstances, it is but proper for the said authority to have forwarded those materials to the Advisory Board and the Confirming Authority. Further, it is more relevant in view of the conclusion of the Detaining Authority that the normal criminal law would not have the desired effect of effectively preventing him from indulging in smuggling of goods in future. This is clear from paragraph No.6 of the grounds of detention.

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6. In the case on hand, it is not in dispute that sanction was granted on 03.04.2006; criminal complaint was lodged on 18.5.2006; no doubt, the Advisory Board offered its opinion on 12.05.2006; however, order was passed by the Confirming Authority (State Government) on 08.06.2006. Even if we accept that the criminal complaint was lodged after the opinion of the Advisory Board, it is not in dispute that sanction was accorded on 03.04.2006 and confirmation order was passed only on 08.06.2006, therefore, in view of the fact that the Detaining Authority heavily relied on those two documents, it is but proper to have placed both the documents before the Confirming Authority and at least the sanction order before the Advisory Board.

7. Now, let us consider the decisions relied on by the learned counsel for the petitioner.

A. In HCP No.603 of 1997, dated 25.02.1998, similar issue was considered by the Division Bench. An argument was advanced that non-placing of sanction order and criminal complaint before the Government and non-consideration of the same by the Government before passing the confirmation order against the detenu are illegal, hence, the continued detention is vitiated. Accepting the contention and considering the importance of placing the sanction order and the criminal complaint before the Government, the Division Bench concluded as follows:-

> " 12. ..... The complaint filed against the petitioner/detenu and the sanction order passed by the customs authority to prosecute the petitioner before the competent Court, are valuable documents and should have been placed before the Confirming authority so as to enable the authority to form an independent opinion. ....
>
> 14. ..... It will be too late in the day for the authority to contend that the sanction order and the criminal complaint are not valid documents which need not have to be placed before the Government at the time of confirmation. Hence, the detaining authority owned a duty to place all the vital documents which came into existence after the sitting of Advisory Board and prior to the confirmation of the said order of detention by the Government."

B. In Rajeswari vs. Secretary to Government ((2006) 1 MLJ (Crl.) 628), the Division Bench, after finding that there was failure to forward relevant materials to the Government by the District

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Collector/District Magistrate, concluded that the detenu was prejudiced by the act of the Detaining Authority. The following reference and the conclusion made by the Division Bench are relevant,

> " 7. In this regard, the learned counsel for the petitioner relied on a Division Bench decision of this Court in the case of A.Vellanai v. Collector and District Magistrate, Tirunelveli 1984 Crl LJ 68. In the above cited decision, while relying upon the judgment reported in Puranlal Lakhanpal v Union of India AIR 1958 SC 163 ((1958) Cr.L.J. 283), the Division Bench, held that the detaining authority is obliged to forward all the subsequent materials having a bearing on the matter to the Government and to the Board and that otherwise the action of the detaining authority in withholding of subsequent information tending to falsify or belie the earlier materials on which the detention order was passed, would stand unchallenged and there is a danger of withholding all materials on the matter in issue in order to sustain the order of detention, which would definitely lead to a situation where the personal right and liberty of a person would be at stake at the hands of the Executive and the safeguard provided by the Constitution for the protection thereof would be impaired. ....."

C. In the decision reported in 1984 Crl.L.J. 68 (A.Vellanai v. Collector & Dist. Magistrate, Tirunelveli), Division Bench of this court concluded that, if the Detaining Authority formed his subject satisfaction only on the basis of the materials inclusive of two alleged sworn statements of third parties, withholding of those two sworn statements and failure on his part to apprise the government about the receipt of the said statements of repudiation would vitiate the detention order. The Division Bench also observed that, by the said conduct of the Detaining Authority, he failed to discharge the statutory function of placing all the materials before the Advisory Board and the Confirming Authority. The dictum laid down in this decision has been followed in all the subsequent decisions including the case laws which we have already referred to.

8. Inasmuch as the initiation of criminal and adjudication proceedings was taken into consideration by the Detaining Authority while passing the detention order and the same having been explicitly referred to in the grounds of detention; taking note of the fact that the sanction order and the criminal complaint are vital documents, we hold that failure to place the same before the Advisory Board and the Confirming Authority vitiates the detention order.

9. In view of our above conclusion, there is no need to go

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into the other grounds raised in the affidavit filed in support of the above Petition.

Habeas Corpus Petition is allowed and the impugned order of detention is quashed. Consequently, the detenu is directed to be set at liberty forthwith from custody unless he is required in connection with any other case or cause.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

JI.

To

1. The Secretary to Govt., Public (SC) Department,
Fort St. George, Chennai-9.

2. Secretary to Govt., Ministry of Finance, Department
of Revenue, COFEPOSA Unit, New Delhi 110 001.

3. The Superintendent, Central Prison, Chennai.

4. The Public Prosecutor, High Court, Madras.

5.The Sub Asst. Registrar (COFEPOSA),High Court, Madras.

+1cc to Mr.S.Palanikumar, Advocate SR 46236

MKJ (CO)
km/16.10.

HCP No.414 of 2006.

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